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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 877

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

v.

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

against

LESTER T. DOYLE, as Trustee in Reorganization, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 10, 1959. The judgment of the Court of Appeals granted a motion by the Securities and Exchange Commission to dismiss the appeal of petitioner herein to review the

order of the United States District Court for the Southern District of New York entered December 23, 1958, denying petitioner's motions (a) to vacate the order directing consummation of the Joint Plan of Reorganization and reopening the proceedings, or, in the alternative, to modify the order confirming the Joint Plan of Reorganization; (b) to vacate the order awarding final allowances; and (c) to compel the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange.

Opinions Below

The judgment of the Court of Appeals was entered on April 10, 1959, as follows: "Especially in view of our opinion in 238 F. 2d 665 and Judge DIMOCK's careful memorandum-decision and opinion of November 28, 1958, we find the grounds of appeal now advanced utterly lacking in merit. The within motion is granted and the appeal is hereby dismissed as frivolous." The District Court's opinion is abstracted in the Appendix to appellant's brief filed in the Court of Appeals, pages 56a to 64a. No opinion of the Court of Appeals was rendered in dismissing petitioner's appeal.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1); and the general supervisory powers of this Court over lower Federal courts.

Questions Presented

1. Whether there was an abuse of judicial discretion by the Court of Appeals in dismissing petitioner's appeal as frivolous.

2. Whether subsequently discovered evidence of fraud should have been disregarded by the Court of Appeals without a hearing on the merits.

3. Whether a court of equity can deprive petitioner of a hearing on the obligation and duty of the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for wilful violation of S.E.C. regulations.

4. Whether an order of strict insolvency of a debtor in Chapter X proceedings is valid when notice of such bar order is deliberately not given to the stockholders by the reorganization trustee or his counsel.

5. Whether the Congress intended to give the Federal courts jurisdiction over the reorganization of intrastate public utilities under Chapter X of the Bankruptcy Act absent State regulatory jurisdiction over such utilities.

Statement of the Case

On September 30, 1958 the District Court held a hearing on two motions filed by petitioner pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for orders, (1) vacating the Court's order of December 17, 1956 consummating the plan of reorganization of debtor and reopening the reorganization of debtor, or in the alternative, for an order modifying the order confirming the plan of reorganization of debtor dated October 8, 1956 so as to permit petitioner to institute an action for damages against the reorganization trustee, and (2) vacating the Court's order of July 1958 awarding final allowances in the reorganization proceedings. (See Appendix to Appellant's Brief, pages 10a-38a.) On November 28, 1958 the Court entered a memorandum opinion denying the said two motions. (See Appendix to Appellant's Brief, pages 56a-64a.) On November 5, 1958 petitioner filed a motion seeking an order pursuant to Rule 81(b) of the Federal Rules of Civil Procedure to compel the Securities and Exchange Commission to institute criminal proceedings against the New York

Stock Exchange for wilful violation of the S. E. C. Regulations. No hearing was held on this motion and the Court on November 28, 1958 entered a memorandum opinion denying the motion. (See Appendix to Appellant's Brief, page 55a.) On December 23, 1958 the Court entered an order denying the said three motions. (See Appendix to Appellant's Brief, pages 65a-66a.) On December 26, 1958 petitioner filed a notice of appeal from the order of the Court dated December 23, 1958. (See Appendix to Appellant's Brief, page 67a.) On February 9, 1959 petitioner filed his brief and appendix in the Court of Appeals on the appeal from the said Court's order of December 23, 1958. On or about March 3, 1959 counsel for the reorganization trustee filed a brief on behalf of the reorganization trustee as appellee. On March 19, 1959 petitioner filed his Reply Brief to Appellee's Brief in the Court of Appeals. On April 1, 1959 petitioner was served with a Notice of Motion by the Securities and Exchange Commission to dismiss petitioner's appeal which had previously been set for argument on April 15, 1959. The motion was heard by the Court of Appeals on April 9, 1959, at which time counsel for the S.E.C. and counsel for the reorganization trustee were allowed to present and complete their argument in support of the S.E.C. motion, whereas petitioner was permitted to begin his argument but not permitted to complete his argument, the Court stating that it had a heavy calendar that day and would rely on the briefs submitted to it, such briefs being presumably petitioner's brief of February 9, 1959, the appellee's brief of March 3, 1959, petitioner's reply brief of March 19, 1959, and petitioner's memorandum in opposition to the S.E.C. motion submitted to the Court of Appeals on April 9, 1959. Prior to the aforesaid S.E.C. motion to dismiss petitioner's appeal no briefs or affidavits were at any time submitted by the S.E.C. to the District Court in opposition to the petitioner's aforementioned mo-

tions, nor had any briefs been filed by the S.E.C. with the Court of Appeals in opposition to petitioner's appeal.

ARGUMENT

In petitioner's reply brief filed with the Court of Appeals on March 19, 1959, petitioner stated that "the paramount issue on this appeal is the integrity of the judicial process." This is also the paramount issue in this petition for certiorari. For what petitioner has maintained in his motions to the District Court and in his briefs to the Court of Appeals is that the reorganization proceedings have been so tainted by a fraudulent course of conduct by the reorganization trustee as to require vacating of the order of the District Court finding strict insolvency of the debtor Third Avenue Transit Corporation, as well as vacating the orders approving, confirming and consummating the reorganization plan. For as this Court has said elsewhere, in requiring that proceedings tainted by the use of perjured or false testimony be reopened, "the untainted administration of justice is one of the most cherished aspects of our institutions and one of our proudest boasts."

In granting the motion by the Securities and Exchange Commission to dismiss petitioner's appeal, the Court of Appeals showed complete unconcern with petitioner's charges of fraud perpetrated upon the court by the reorganization trustee. In brief, such fraud consisted of the following: (1) Continuation of the reorganization proceedings after such proceedings had become moot after regulatory jurisdiction over rates of fare and services of debtor Surface Transportation Corporation of New York was removed from the Public Service Commission of the State of New York to the City of New York; (2) Filing of a fraudulent application for delisting the common stock of debtor Third Avenue Transit Corporation with the Securities and

Exchange Commission by the New York Stock Exchange, and (3) Fraudulent plan of concealment from the stockholders of the entry by the Court of the order of strict insolvency of debtor Third Avenue Transit Corporation.

The Reorganization Proceedings Became Moot Prior to the Entry of the Order Finding Strict Insolvency of Debtor

Under Section 178 of the Bankruptcy Act (11 U. S. C. 578) it is provided that "In case a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State Commission having regulatory jurisdiction over such debtor, a plan shall not be approved as provided in Section 574 of the Act, unless such State Commission shall have first certified its approval of such plan as to the public interest therein and the fairness thereof."

From the legislative history of the section as well as from the language of the Act itself and by applying the maxim that "that which is properly implied is as much a part of a statute as that which is expressed" it would seem clear that (1) Congress did not give the Federal courts jurisdiction over reorganization plans of all intrastate public utilities; (2) The State Commission must have regulatory jurisdiction over the intrastate public utility whose reorganization plan under Chapter X must be approved by such State Commission, and (3) The State Commission must have such regulatory jurisdiction at the time the reorganization plan for such intrastate public utility is submitted to the Court for certification by such State Commission.

Thus in Senate Report No. 1916 on Revision of the National Bankruptcy Act (75th Congress, 3rd Session, 1938, p. 6) discussing the subject of "Approval by State Com-

missions," the Report says: "The House bill did not include the provisions of Section 77B which requires the approval, by State Commissions possessing regulatory jurisdiction over intrastate public utility corporations, of plans of reorganization for such corporations. This jurisdiction is in effect preserved in Section 224 of the House bill, but your committee considers it desirable to remove any ambiguity with respect thereto by restoring to the bill the language of the present law."

The reference to the "present law" is to Section 77B(e)(2), 11 U. S. C. 207(e), 1934 ed., which provided as follows:

> "In case the debtor is a utility subject to the jurisdiction of a regulatory commission or commissioners or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, a plan of reorganization shall not be confirmed until (a) it shall be submitted to each such commission or authority having regulatory jurisdiction over the debtor, (b) an opportunity shall be afforded each such commission or authority to suggest amendments or objections to the plan, and (c) the judge shall consider such amendments or objections at a hearing at which each such commission or authority can be heard. In case the debtor is a public utility corporation wholly intrastate in character no court shall approve any plan of reorganization if the regulatory commission of such State having jurisdiction over such public utility certifies that the public interest is affected by said plan, unless said regulatory commission shall first approve of said plan as to the public interest therein and the fairness thereof. If said regulatory commission shall not within thirty days or such additional period as the court may prescribe after the submission of a plan to it file said certificate it shall be deemed that the public interest is not affected by said plan."

On June 15, 1955 the reorganization trustee filed an amended reorganization plan covering debtor Third Avenue Transit Corporation, a holding company wholly intrastate, and its wholly owned subsidiaries, Surface Transportation Corporation of New York, Westchester Street Transportation Company, Inc., The Westchester Electric Railroad Company, the Yonkers Railroad Company, and Warontas Press, Inc. On June 21, 1949 the reorganization proceedings for all these companies were consolidated by order of the Court. The hearing on said amended reorganization plan was scheduled for July 6, 1955 and pursuant to such hearing the Court issued its order on August 5, 1955, finding strict insolvency of the debtor, Third Avenue Transit Corporation.

At the time of the entry of such order the applicable provision of the Public Service Law governing regulatory jurisdiction by the Public Service Commission over debtors herein was as follows:

"Notwithstanding the provisions of this chapter, or any other provision of law, the commission shall have no jurisdiction with respect to rates of fare, transfers, zones, combined rides and the division of the receipts thereof, established pursuant to any contract, franchise, or consent heretofore or hereafter made between any omnibus corporation, street railroad corporation or any corporation or person operating a street surface transportation facility and any city having a population of more than one million inhabitants, or with respect to the service related to such rates of fare. As to such matters the governing body of any such city or any agency of such city to be designated by it shall have and exercise the power and duties which, except for this section, would be had and exercised by the commission."

It is clear from a reading of this section that the Public Service Commission was deprived of jurisdiction with respect to rates of fare, transfers, zones, combined rides and the division of receipts thereof, and service relationship to such rates of fare. Since regulatory agencies have a responsibility to permit regulated intrastate public utilities a reasonable rate of return on the value of the property devoted to public use, and since the Public Service Commission of the State of New York was deprived of such responsibility with respect to omnibus companies in the City of New York, it would be logical to assume that the Congress did not intend to give jurisdiction to the Federal Courts over reorganization plans for such intrastate public utilities which ceased to be subject to the regulatory jurisdiction of a State Commission. Since Surface Transportation Corporation of New York was an intrastate public utility whose operations were completely within the borders of the City of New York and accordingly under the regulatory jurisdiction of the City of New York, and since this company in 1955 contributed about 95% of the gross revenues of the debtors in reorganization, it would be logical to assume that the Federal Court ceased to have jurisdiction over the reorganization of such debtor at the time the State Public Service Commission was deprived of its regulatory jurisdiction over such debtor. With respect to the scope of the concept of "regulatory jurisdiction", petitioner in his brief to the Court of Appeals has pointed out that the term has a definitely ascertainable meaning, and that when applied to a public service commission it means the delegation by statute to such board the authority to fix the rates or compensation for public utilities.

That the reorganization proceedings became moot on March 27, 1950 would appear to be indicated by the decision of the Appellate Division, First Department, New York Supreme Court in the *New York City Omnibus Corp.* case, where the court held as follows:

"While this submission was sub judice, Chapter 163 of the Laws of 1950 was enacted on March 27, 1950, effective as of the same date. It is there provided that the Public Service Commission shall have no jurisdiction with respect to rates of fares established pursuant to any contract or franchise heretofore or hereafter made between any omnibus corporation and a city having more than a million inhabitants. In view of this legislation, the controversy submitted has become moot, and the submission should, accordingly, be dismissed. (Wilmerding v. O'Dwyer, 297 N. Y. 664.)"

Whether the reorganization proceedings with respect to Surface Transportation Corporation of New York became moot on March 27, 1950, or on June 23, 1953, when jurisdiction of the Public Service Corporation with respect to both fares and service of the above-mentioned debtor ceased, certainly on July 6, 1955, when the Court held hearings on the trustee's amended reorganization plan, the District Court did not have the jurisdiction required by Section 178 of the Bankruptcy Act (11 U.S.C. 578) for approval of a reorganization plan involving the above-mentioned debtor. It should be noted that the counsel for the reorganization trustee submitted a brief as *amicus curiae* in the above noted New York Appellate Division case. It should be further noted that the reorganization trustee gave no consideration to the tax windfall that may have accrued to Surface Transportation Corporation of New York with the removal of Public Service Commission regulatory jurisdiction over said debtor, since the provision of the New York Tax law with respect to the state tax on the furnishing of utility services provided:

"Notwithstanding any other provision of this chapter or of any other law, a tax equal to two per centum per annum of its gross income is hereby imposed upon

every utility doing business in this state which is subject to the supervision of the state department of public service. (New York State Tax Law, Sec. 186a.)"

The New York Stock Exchange Filed a Fraudulent Application for Delisting the Common Stock of Debtor With the Securities and Exchange Commission

The Regulations of the Securities and Exchange Commission with respect to the suspension and delisting of securities listed and registered on a national securities exchange are set forth in the Appendix to Appellant's Brief pages 20a to 25a. On April 24, 1957 the New York Stock Exchange filed an application under Rule X-12d2-2 for the delisting of the common stock of debtor Third Avenue Transit Corporation. This application was as follows:

FORM 25

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C.

NOTIFICATION OF THE REMOVAL FROM LISTING AND REGISTRATION OF MATURED, REDEEMED OR RETIRED SECURITIES

The New York Stock Exchange hereby notifies the Securities and Exchange Commission of its intention to remove the entire class of the following security from listing and registration on the Exchange at the opening of business on May 4, 1957, pursuant to the provisions of Rule X-1202-2(a).

THIRD AVENUE TRANSIT CORPORATION

Name of Issuer

(now SURFACE TRANSIT, INC.)

Capital Stock without par value

Description of Security

This removal is being effected because the Exchange knows or is reliably informed:

(Indicate the applicable paragraph below and insert appropriate dates and other details)

☐ (1) That the entire class of this security was called for redemption, maturity or retirement on .....; appropriate notice thereof was given; funds sufficient for the payment of all such securities were deposited with an agency authorized to make such payment; and such funds were made available to security holders on.....

☐ (2) That the entire class of this security was redeemed or paid at maturity or retirement on .....

☐ (3) That on..... the instruments representing the securities comprising the entire class of this security came to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right except, if such be the fact, the right to receive an immediate cash payment.

☐ (4) That all rights pertaining to the entire class of this security were extinguished on December 17, 1956. (Briefly summarize details below)

Plan of Reorganization of Debtor under Chapter 10 of Bankruptcy Act confirmed by U.S.D.C. for the Southern District of New York on October 8, 1956. On December 17, 1956, pursuant to order of the court, the reorganization trustee transferred the operating assets of the Third Avenue System to the reorganized Corporations. The Capital Stock of the debtor did not participate in the Plan of Reorganization. The Exchange is informed that appeals from orders of the court have been terminated.

The Exchange also notifies the Securities and Exchange Commission that as a result of the above indicated conditions this security was suspended from trading on August 8, 1955.

New York Stock Exchange
Department of Stock List
Name of Exchange

L. J. Hasselbach
By L. J. Hasselbach
Name

Assistant Director
Title

April 12, 1957
Date

The above form states that the common stock of debtor Third Avenue Transit Corporation would be removed on May 4, 1957 from listing and registration by the New York Stock Exchange.

That this application for delisting was fraudulent is indicated by the following facts:

(1) The common stock of debtor Third Avenue Transit Corporation was not a "matured, redeemed or retired" security to which regulation X-12D2-2 applies.

(2) The reorganization trustee, in his application for qualification of indentures under the trust indenture act of 1939, filed with the S.E.C. on November 30, 1956 in answer to the question "Principal Owners of Voting Securities" stated: "By order dated August 5, 1955, the United States District Court for the Southern District of New York found that the company was insolvent and that the shareholders had no interest in the property."

(3) In the Certificate of Amendment of the Certificate of Incorporation of debtor Third Avenue Transit Corporation, filed under the New York Stock Corporation Law on November 19, 1956, the reorganization trustee stated:

> "Par. 3. The certificate of incorporation of the corporation is hereby amended so as to change the name of the corporation, to increase the number of directors, to authorize new shares, to eliminate its presently authorized capital stock from the enumeration and description of shares which the corporation is authorized to issue," and
>
> "Par. 5. The presently authorized 167,509 shares of capital stock of the corporation without par value have been eliminated by the Joint Plan of Reorganization pursuant to Chapter X of the National Bankruptcy Act."

(4) The Certificate of Merger of Surface Transportation Corporation of New York with Third Avenue Transit Corporation, pursuant to Sec. 26 and 85 of the Stock Corporation Law, executed by the reorganization trustee on November 19, 1956, stated:

"Par. 4. Joint Plan of Reorganization dated June 26, 1956 confirmed October 8, 1956, provides among other things that Surface be merged into Third Avenue Transit Corporation and that the trustee in reorganization have full power and authority to take all steps necessary and proper to effectuate said merger; and

"Par. 5. Surface is hereby merged into Third Avenue Transit Corporation and Third Avenue assumes all of the obligations of Surface."

(5) The New York Stock Exchange's own regulations provide that in the case of matured, redeemed or retired securities, the Exchange simultaneously with the suspension of trading in such securities will give notice to the Securities and Exchange Commission of its intention to remove such security from listing and registration. Thus Rule 499(8) of the New York Stock Exchange states:

"An entire class, issue or series is paid, redeemed or retired—whenever the entire outstanding amount of a listed class, issue or series is retired through payment at maturity, or through redemption, reclassification or otherwise, the Exchange, at a time which is appropriate in consideration of the circumstances of the particular case, may suspend dealings in the security and give notice to the Commission on the Commission's Form 25, of intention to remove such security from listing and registration, as required by Rule X-12D2-2 of the Commission." (Commerce Clearing House, New York Stock Exchange Guide, Vol. 2, page 4736.)

It should be noted that the reorganization trustee as a member of a New York Stock Exchange firm was thoroughly conversant with the rules of the New York Stock

Exchange. It should further be noted that the secretary of debtor Third Avenue Transit Corporation had, as an officer of a listed corporation, a copy of the New York Stock Exchange manual spelling out the Exchange's rules as to delisting, and as an employee of counsel for the reorganization trustee such information was readily available to such counsel. For the Securities and Exchange Commission to maintain that the action of the New York Stock Exchange in delisting the common stock of debtor Third Avenue Transit Corporation was in conformity with applicable S.E.C. regulations, and further for the S.E.C. to justify such action by the New York Stock Exchange is beyond petitioner's comprehension.

Fraudulent Concealment From Stockholders of Entry of Order of Strict Insolvency of Debtor Third Avenue Transit Corporation

Petitioner maintains that his brief on appeal to the Court of Appeals and his reply brief show that the District Court erred in dismissing petitioner's motions since the fraud involved was, as alleged, sufficient to have warranted a court of equity in disregarding or setting aside the order of August 5, 1955 finding strict insolvency of debtor.

Petitioner maintains that the fraudulent course of conduct by the reorganization trustee with respect to the insolvency order is indicated by the following:

(1) The District Court issued its order, presumably prepared by counsel for the reorganization trustee, dated June 27, 1955, as follows:

> "Ordered that the said trustee give notice substantially in the form annexed hereto, and marked Exhibit A, of the contents of his amended plan and the continuance

of hearings herein to all the creditors and stockholders of the debtors by mailing copies of such notice to them on or before June 29, 1955, at their addresses as they appear on the books of the debtors or may otherwise be known to said Trustee." The hearing was scheduled for July 6, 1955.

The trustee knew that such notice could not have reasonably been received in time for such hearing by stockholders such as petitioner herein, whose stock was registered in the names of brokers as nominees, nor could such notice have been received by the owners of debentures and first mortgage bonds of debtor, many of such securities also being registered in the names of brokers as nominees.

(2) The assistant secretary of debtor filed an affidavit on June 29, 1955 with the District Court attesting to service of notice on creditors and stockholders as required by the court's order of June 27, 1955. Neither at that time or at any other time was a certified list of the creditors and stockhholders to whom notice was given filed with the Court.

(3) Notice by publication to stockholders and creditors was not claimed by trustee with respect to the aforesaid hearing.

(4) At the hearing on allowances on June 27, 1957, petitioner offered to the S.E.C. letters from other stockholders showing failure to receive notice of the aforesaid hearing, and requested the S.E.C. to examine into the bona fides of the affidavits of notice. The S.E.C. refused.

(5) The trustee did not transmit notice of entry of the bar order to any stockholder or creditor.

(6) At the hearing on allowances on June 26, 1957 petitioner learned for the first time that an attorney for a group of six stockholders (all related or closely connected

with a former director of debtor) had received notice of entry of the order of strict insolvency and had resigned on August 3, 1955, two days before the order of strict insolvency was entered, and that on August 3, 1955, all of the stockholders represented by such attorney had disposed of their stock in debtor. The result was that no stockholder with knowledge of the entry of the order of strict insolvency was in position to appeal the said order.

(7) On August 8, 1955 the New York Stock Exchange suspended trading in Third Avenue Transit Corporation common stock as a result of receiving notice that the District Court had determined in its order dated August 5, 1955 that "the stockholders of said debtor have no interest in the property." Furnishing of such notice to the New York Stock Exchange is no substitute for furnishing such notice to the stockholders directly involved. It should be noted that neither the New York Stock Exchange or the Securities and Exchange Commission made any attempt to bring the order of the District Court to the notice of the stockholders affected.

When Mr. Justice William J. Brennan, Jr. was a member of the New Jersey Supreme Court he made the following comments in a disbarment proceeding which petitioner feels can be applied to the present situation. He then said:

> "There is no profession, save perhaps the ministry, in which the highest morality is more necessary than the law. It has been very aptly said that there is no profession apart from the legal profession where there is greater disparity between true character and reputation. The fault lies in the lack of understanding by the public principally provoked by the transgressors among us—not so much by the flagrant violators because the public is quick to appreciate the inevitableness of their existence, but by those (members of the

bar) who by unconscionable conduct tip the delicate balance in which trust and confidence in a lawyer's actions hangs; not so much by malefactions which are branded criminal but by those that are in the twilight zone of morality."

It is petitioner's contention that the error committed by the District Court was so substantial and contrary to law as manifestly warranted petitioner to have the legal errors reviewed on appeal, and that the dismissal of petitioner's appeal by the Court of Appeals as frivolous was an abuse by a court of equity of its judicial discretion.

CONCLUSION

Wherefore, it is respectfuly submitted, petitioner's application should be granted.

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Dated: April 24, 1959

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BRIEF FOR DOYLE, AS TRUSTEE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LESTER T. DOYLE, as Trustee in Reorganization, *et al.*,
Respondents.

BRIEF FOR DOYLE, AS TRUSTEE, IN OPPOSITION TO PETITION FOR CERTIORARI (WITH APPENDIX)

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Dated: May 22, 1959.

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Respondents.

BRIEF FOR DOYLE, AS TRUSTEE, IN OPPOSITION

Opinions Below

The opinion of the District Court (Dimock, D.J.) has not been reported, but is to be found at pages A 2 to A 10 of the appendix to this brief. The memorandum decision of the Court of Appeals dismissing the appeal has not been reported, but appears at page A 1 of the appendix hereto.

The opinion of the Court of Appeals on a prior and directly related appeal by petitioner is reported at 238 F. 2d 665 (cert. den., 352 U. S. 1031) and appears at pages A 11 to A 18 of the appendix.

The Question Presented

Whether the Court of Appeals erred in dismissing an appeal which presented (a) a question of fact previously litigated and decided by the District Court adversely to petitioner, and affirmed by the Court of Appeals, and (b) contentions of law utterly lacking in merit and frivolous on their face.

Statement

Proceedings for the reorganization of Third Avenue Transit Corporation and subsidiaries were commenced by the filing of an involuntary petition on October 25, 1948. On June 21, 1949 trustees were appointed. On July 26, 1956 a Plan of Reorganization was approved and the Plan was confirmed on October 8, 1956.

Petitioner, a stockholder of Third Avenue Transit Corporation, first appeared on the scene in July 1956 and made six motions assailing the regularity of the proceedings in a variety of respects. Upon the denial of his motions he appealed to the Court of Appeals, which affirmed the District Judge (*Woolfson* v. *Doyle*, 2 Cir., 238 F. 2d 665) and found upon careful consideration that "there is not a shred of merit in any" of the "miscellany of points" that he raised. This Court denied certiorari (352 U. S. 1031; petition for rehearing denied 353 U. S. 931).

Following the conclusion of these appeals the District Court, on April 10, 1957, ordered that exchange and distribution pursuant to the Plan be effected, and on April 18, 1957 found that the Plan had been substantially consummated.

Petitioner, unmoved by the determination of the Court of Appeals that:

> "The insolvency of the debtor is abundantly established as of the date of the order of adjudication and long prior thereto."

continued to make groundless motions, irresponsibly attacking the reorganization trustee, the Securities and Exchange Commission and the New York Stock Exchange. He continued to burden the courts with contentions which the Court of Appeals had described as "unsubstantial and technical". He did not, however, contend that the debtor had become solvent, so as to entitle stockholders to participate in a plan of reorganization.

Trustee's Contentions

In earlier litigation petitioner charged the reorganization trustee with failure to mail a notice of continued hearings on plans of reorganization to stockholders and creditors as required by an order of the District Court. He offered no evidence in support of these charges and they were rejected by the District Court. The District Court was affirmed on appeal, and certiorari was denied by this Court.

Petitioner renewed these charges in this proceeding and again offered no substantial evidence in any way supporting them. They were again rejected by the District Court, and the Court of Appeals quite properly dismissed petitioner's appeal as frivolous (*post*, pp. 4-6).

In addition to these wholly unsupported and false charges of wrongdoing petitioner advances two contentions of law which are frivolous on their face.

First he asserts that a 1950 amendment to the New York Public Service Law removing from the comprehensive regulatory jurisdiction of the Public Service Commission power over rates of fare and service in New York City had the effect of depriving the District Court of jurisdiction to proceed with the reorganization of the debtors. This approaches nonsense (*post*, pp. 6-8).

Petitioner also asserts that because of an alleged irregularily in the delisting of the common stock of debtor Third

Avenue Transit Corporation by the New York Stock Exchange, the reorganization proceedings should be reopened. The gist of this complaint against the Stock Exchange is that the stock was delisted pursuant to the provisions of Securities and Exchange Commission Rule X-12D2-2 rather than Rule X-12D2-1. For this petitioner also asked the District Court to order the Securities and Exchange Commission to commence a criminal proceeding against the Stock Exchange. However, the District Court found that there had been no irregularity in the proceedings of the Stock Exchange. Furthermore, the applicable statute does not authorize the Securities and Exchange Commission to commence criminal proceedings against anyone. In addition, even if the Commission had such power the District Court could not substitute it judgment for that of the Commission in determining whether criminal proceedings should be instituted (*post*, pp. 8-10).

In view of the obvious lack of merit in any of petitioner's contentions the Court of Appeals was entirely correct in dismissing the appeal.

Argument

The Question of Fact

For four years petitioner has been making grave allegations of wrong-doing on the part of the reorganization trustee and the Securities and Exchange Commission. His petition to this Court is replete with unsupported charges of "fraud".

In 1956 he sought to examine the Chairman of the Securities and Exchange Commission, charging that "the Commission has failed to give the Court the impartial and expert administrative assistance * * * required by the Bankruptcy statutes". He sought removal of the reorganization trustee, charging that he had "deliberately concealed from this Court the fact that the debtor has become solvent".

In this earlier litigation he also charged that the reorganization trustee had wilfully failed to comply with an order of the court directing the transmission to creditors and stockholders of a summary of an amended plan and a notice of continued plan hearings. While petitioner was vociferous in these charges, he offered no evidence in support of them. The District Court, accepting the detailed affidavits attesting to the regularity of the mailing, rejected his contentions.

Petitioner persisted and appealed to the Court of Appeals. That court affirmed the finding of the District Court that all required notices had been sent to creditors and stockholders. (*Woolfson* v. *Doyle*, 2 Cir., 238 F. 2d 665; A 15-A 17). Petitioner, unmoved, then sought certiorari and in his petition presented the question:

> "2. Whether the failure of the trustee of debtor to transmit to stockholders and creditors notice of a hearing * * * is not violative of due process." (Pet. p. 2)

His petition was denied by this Court (352 U. S. 1031), as was his petition for a rehearing (353 U. S. 931).

Undeterred by the outcome of this litigation, petitioner renewed his charges of wrong-doing in a series of more recent motions seeking, among other things, to reopen the reorganization proceedings on account of this alleged fraudulent failure to notify the stockholders of the proceedings.

Judge Dimock carefully considered the renewed charges and correctly concluded:

> "All of these charges were heard and rejected in a previous motion made by Woolfson and their rejection was affirmed by the Court of Appeals in In re Third Avenue Transit Corporation, 238 F. 2d 665, cert. denied 352 U. S. 1031." (A 3)

The only evidence offered by petitioner in this proceeding was an affidavit containing what purported to be copies

of letters stating that certain stockholders had not received a notice. As to this matter the District Judge said:

> "An answering affidavit states that the notices were mailed to the proper addresses and not returned undelivered by the Post Office. I accept the truth of the answering statement. The direction of the court was that the notices be mailed and they were properly mailed so that, even if some of them were not received, that would not constitute a defect in the proceedings." (A 3)

No amount of repetition of unfounded charges is a substitute for proof. The conclusion of the District Court was clearly correct on the evidence, and in the light of the lengthy prior litigation no substantial question was presented to the Court of Appeals. Hence that court was obviously right in dismissing the matter on grounds of frivolity.

Frivolous Contentions of Law

(1) Alleged lack of jurisdiction in the District Court.

Petitioner also charges that the reorganization trustee fraudulently participated in the "Continuation of the reorganization proceedings after such proceedings had become moot after regulatory jurisdiction over rates of fare and services of debtor Surface Transportation Corporation of New York was removed from the Public Service Commission of the State of New York to the City of New York;" (Pet. p. 5). Petitioner is wrong and his argument farcical.

On his prior appeal he argued that the District Court had erred in submitting the plan of reorganization to the Public Service Commission for certification of its approval pursuant to Section 178 of Chapter X (11 U. S. C. § 578) and urged, then as now, that by reason of a 1950 amendment to the Public Service Law (§ 5-d) removing from the comprehensive regulatory jurisdiction of the Commission power over rates of fare and service in New York City, the Com-

mission no longer possessed such "regulatory jurisdiction" over the debtors as to require its approval of the plan. The court did not determine whether the removal of these aspects of regulatory jurisdiction made Section 178 inapplicable, but disposed of the contention saying:

> "[6] Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178, 11 U. S. C. A. § 578, since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission." (238 F. 2d 665, 669; A 17).

Judge Dimock, we urge, was clearly right in holding that the Public Service Commission continued to have regulatory jurisdiction within the meaning of Section 178 (A 5-A 6).

However, if one were to assume, contrary to fact, that the amendment to the Public Service Law resulted in the debtor Surface not being "subject to the jurisdiction of a State commission having regulatory jurisdiction", the District Court, at most, required that an unnecessary step be taken. And, as the Court of Appeals observed, petitioner was in no way injured.

Petitioner's argument that upon the amendment of the Public Service Law the proceedings "had become moot". (Pet. pp. 6-11) is based upon his complete misapprehension of the place of Section 178 in the statutory scheme of Chapter X.

Section 178 in no way makes regulatory jurisdiction of a State commission a condition precedent for the exercise of the court's reorganization jurisdiction.

The provision is that "*in case** a debtor is a public utility corporation" "subject to the jurisdiction of a State commission * * * a plan shall not be approved * * *" unless such State commission shall have certified its approval or

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* Italics are ours throughout.

failed to make any certification within the period prescribed. Section 178 patently does not deprive the District Court of jurisdiction *in other cases i.e.*—where the debtor is not a public utility corporation meeting the specifications set forth therein.

The amenability of corporations to reorganization under Chapter X is determined by Section 106, subdivisions (5) and (3); (11 U. S. C. § 506, subdivs. (5), (3)) which make any corporation which could be adjudged a bankrupt, and any railroad corporation, excepting a railroad corporation authorized to file a petition under Section 77 (11 U. S. C. § 205), subject to Chapter X proceedings.

It is obvious that Section 178 merely provides an additional step to be taken in the proceeding when the prescribed conditions exist. It has no bearing whatever on the jurisdiction of the District Court over debtors not within its terms. Petitioner's contentions to the contrary are patently frivolous.

(2) Charges against the New York Stock Exchange.

Petitioner charges that "The New York Stock Exchange filed a fraudulent application for delisting the common stock of debtor with the Securities and Exchange Commission", (Pet. p. 11) and he poses the further question:

> "3. Whether a court of equity can deprive petitioner of a hearing on the obligation and duty of the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for wilful violation of S. E. C. regulations." (Pet. p. 3)

The gist of petitioner's grievance against the Stock Exchange is that the old common stock of debtor Third Avenue Transit Corporation was delisted pursuant to the provisions of Securities and Exchange Commission Rule X-12D2-2 rather than Rule X-12D2-1, which he deems applicable. There is no occasion to lengthen this brief with much comment as to this contention. It is clearly erroneous.

The District Judge in his well considered opinion fully demonstrates that there was not a scintilla of irregularity in any action of the Stock Exchange (A 7 to A 10).

Furthermore, assuming contrary to fact, that there had been some irregularity on the part of the Stock Exchange, petitioner's remedy would have been a direct proceeding against the Exchange and not an application to reopen the reorganization proceedings.

Petitioner also sought an order directing the Securities and Exchange Commission to commence criminal proceedings against the Stock Exchange. The patient District Judge denied this motion contemporaneously with his determination of petitioner's other motions. He concluded that "the actions of the Stock Exchange were in accordance with its rules and the rules of the Securities and Exchange Commission." (A 10). Hence there was no occasion for any proceedings, criminal or otherwise, to be brought against the Stock Exchange.

There is no provision in the Securities Exchange Act of 1934 authorizing the Securities and Exchange Commission "to institute criminal proceedings" against anyone. The statute is precisely to the contrary.*

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* Sec. 21. (e) (15 U. S. C. § 78 (u)).

"Whenever it shall appear to *the Commission* that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it *may in its discretion bring an action in the proper district court of the United States*, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, *to enjoin* such *acts or practices*, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. *The Commission may transmit* such *evidence* as may be available concerning such acts or practices *to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.*"

Moreover, even if one were to assume, in contradiction of the facts, that there had been some irregularity on the part of the Stock Exchange and further, in contradiction of plain law, that the Securities and Exchange Commission had authority to institute a criminal proceeding, it is clear that there was no jurisdiction in the District Court, upon the motion of a private party, to compel the Commission to take such action. *Leighton* v. *S. E. C.*, D. C. Cir., 221 F. 2d 91 (1955); *Crooker* v. *S. E. C.*, 1 Cir., 161 F. 2d 944 (1947).

Conclusion

Petitioner's contentions are patently frivolous. The dismissal by the Court of Appeals was entirely appropriate. The petition should be denied.

Dated, New York, N. Y.
May 22, 1959.

Respectfully submitted,

EDWARD D. BURNS,
Attorney for Lester T. Doyle, Reorganization Trustee.

JOHN A. KISER,
DANIEL J. DRISCOLL,
of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTERS
of
THIRD AVENUE TRANSIT CORPORATION,
et al.,
Debtors,

A. PHILIP WOOLFSON,
Appellant,
v.
LESTER T. DOYLE, as Trustee in Reorganization, *et al.*,
Appellees.

On S. E. C.'s Motion to Dismiss Appeal

Especially in view of our opinion in 238 F. 2d 665 and Judge Dimock's careful memorandum-decision and opinion of November 28, 1958, we find the grounds of appeal now advanced utterly lacking in merit. The within motion is granted and the appeal is hereby dismissed as frivolous.

C. C. HINCKS
J. EDWARD LUMBARD
STERRY R. WATERMAN
U. S. C. JJ.

April 10, 1959

#529

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTERS *of* THIRD AVENUE TRANSIT CORPORATION, SURFACE TRANSPORTATION CORPORATION OF NEW YORK, WESTCHESTER STREET TRANSPORTATION COMPANY, INC., THE WESTCHESTER ELECTRIC RAILROAD COMPANY, WARONTAS PRESS, INC., *Debtors.*	In Proceedings for the Reorganization of Corporations Pursuant to Chapter X of the Bankruptcy Act. No. 85851 No. 86410 No. 86413 No. 86412 No. 86537 (Consolidated Proceedings)

Memorandum

DIMOCK, D.J.

A. Philip Woolfson, as a beneficial owner of stock in Third Avenue Transit Corporation, moves to vacate three orders of this court made during consolidated proceedings for the reorganization of Third Avenue Transit Corporation and others pursuant to Chapter X of the Bankruptcy Act. Woolfson asks that the order confirming the reorganization of Third Avenue Transit Corporation be modified so as to permit him to institute an action for damages against the reorganization trustee or that the order of December 17, 1956, finding that the plan of reorganization had been substantially consummated, be vacated and the proceedings reopened on the ground that a preceding order finding that the stockholders had no interest was void and that fraud was perpetrated on the court by the reorganization trustee.

He also asks that the order awarding final allowances to the parties be vacated on the ground that fraud was perpetrated on the court by the Securities and Exchange Commission.

Woolfson thus makes three charges: first, that the order of August 5, 1955, finding the debtor insolvent and that the stockholders had no interest was void, second, that fraud was perpetrated on the court by the reorganization trustee and, third, that fraud was perpetrated on the court by the Securities and Exchange Commission. These three charges will be taken up in order.

Woolfson says that the order finding that the stockholders had no interest was void because of (a) failure of the reorganization trustee to give notice as required by an order of June 27, 1955, to Woolfson and stockholders of record of a scheduled hearing for July 6, 1955, (b) failure of the reorganization trustee to give notice to Woolfson and stockholders of hearings on the question of strict insolvency of the debtor, and (c) failure of stockholders to receive notice of the order of August 5, 1955, finding that the stockholders had no interest.

All of these charges were heard and rejected in a previous motion made by Woolfson and their rejection was affirmed by the Court of Appeals in In re Third Avenue Transit Corporation, 238 F. 2d 665, cert. denied 352 U. S. 1031.

Woolfson attempts to support the present application by affidavits that certain stockholders did not receive notice of a hearing upon the reorganization plan scheduled for July 6, 1955. An answering affidavit states that the notices were mailed to the proper addresses and not returned undelivered by the Post Office. I accept the truth of the answering statement. The direction of the court was that the notices be mailed and they were properly mailed so that, even if some of them were not received, that would not constitute a defect in the proceedings. "[F]ailure to receive notice properly given does not affect the validity

of the confirmation order, and only gives grounds for appeal to the court to exercise its discretion favorably." Northern American Car Corp. v. Peerless W. & V. Mach. Corp., 2 Cir., 143 F. 2d 938, 941; see also Gleeson v. Carl, 9 Cir., 219 F. 2d 64. Even were I satisfied that some of the notices were not received I would not exercise my discretion. The stockholders were vigorously and capably represented at all hearings where their interests were involved.

Woolfson's second charge is that fraud was perpetrated on the court by the reorganization trustee. He attempts to support this by three specifications: (a) an affidavit of June 29, 1955, with respect to compliance with the order of June 27, 1955, requiring notice to stockholders of record, contained false statements known to be false by the reorganization trustee, (b) that subsequent affidavits contained similar statements known to be false by the reorganization trustee, and (c) that the reorganization trustee knew that trading of the common stock on the New York Stock Exchange had been suspended on August 5, 1955, without approval of the court and that it had been so suspended and later delisted without approval by the Securities and Exchange Commission.

The charges with respect to false statements with respect to compliance with the order requiring notice to the stockholders of the hearing on July 6, 1955, have been disposed of by the previous decisions of this court and the Court of Appeals above referred to and by the discussion above. The matter of suspension of the common stock from trading on the New York Stock Exchange and its delisting will be discussed in connection with a similar charge against the Securities and Exchange Commission. As will there appear there was no violation of law or regulations in connection with approval by the court or the Securities and Exchange Commission of the suspension or delisting so that the reorganization trustee could not have been guilty of fraud because of his knowledge that any of

those proceedings had been taken without approval by the court or the Securities and Exchange Commission.

Woolfson's final specification of fraud on the court by the reorganization trustee was his alleged failure to get the court's instructions whether the reorganization proceedings had not become moot on account of withdrawal of jurisdiction of the New York Public Service Commission prior to the order finding that the stockholders had no interest.

Whatever may be the theory of this specification it is at least clear that it is grounded upon withdrawal of jurisdiction of the New York Public Service Commission. Since the New York Public Service Commission continued to have jurisdiction of the debtor throughout the proceedings, this specification must fail.

The action of this court in referring the plans to the Public Service Commission was required by law. The bankruptcy statute refers to "a State Commission having regulatory jurisdiction", Section 178; and even after the 1950 amendments the Commission continued to have a great deal of regulatory jurisdiction. The amendments to the Public Service Law made in 1950 only affected the jurisdiction of the Public Service Commission with respect to service and rates of fare. Article 3-A of the Public Service Law continues to grant to the Commission "general supervision of all omnibus corporations", "the power to examine omnibus corporations and keep informed as to their general condition, capitalization, franchises and the manner in which the property is operated * * * their compliance with all provisions of law * * * and to issue such orders in connection therewith as may be required", "to require every omnibus corporation * * * to file with the Commission an annual report", "to examine the accounts * * * and * * * to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited", "to investigate the cause of all accidents", "to compel by subpoena duces tecum, the production of any accounts, books,

contracts • • • and papers", Section 61. The Commission's approval is also required for the issuance of stocks, bonds, notes or other evidences of indebtedness payable on demand or at periods of more than 12 months, Section 62. Reorganizations of omnibus corporations "• • • shall be subject to the supervision and control of the Commission, and no such reorganization shall be had without the authorization of such Commission", Section 62-a. The transfer of franchises or stocks is also subject to the approval of the Commission, Section 63. A certificate of public convenience and necessity must be obtained before an omnibus line can be operated, Section 63-d. The Commission is also empowered to require, among other things, the maintenance of insurance or self-insurance funds, Section 61, subdiv. 13-a.

Thus, it appears that the debtors are clearly "subject to the jurisdiction of a State Commission having regulatory jurisdiction", Section 178, and this court was right in submitting the plans of reorganization for certification and report by that Commission.

Woolfson's charges of fraud on the court by the Securities and Exchange Commission he attempts to support by four specifications which I will take up in order.

First, it is said that the advisory report of the Securities and Exchange Commission approving the plan of reorganization at the time of its proposal failed to state that the common stock had been suspended from trading on the New York Stock Exchange on August 5, 1955 and that no action had been taken to delist it. The significance of this specification is not apparent. Without some charge that the court was unaware that the stock had been suspended and not delisted a charge of fraud upon the court by failing to disclose those facts has no force.

The second specification of fraud upon the court by the Securities and Exchange Commission is that the Commission failed to advise the court that the procedural re-

quirements of Chapter X had not been complied with by the trustee and that the copies of summaries of annual reports had not been mailed to stockholders and notices of hearings on reorganization plans had not been mailed to stockholders. The matter of notices of hearings has been disposed of upon Woolfson's previous motions and by the discussion above. Section 190 of the Bankruptcy Act requires that the court shall direct that copies of summaries of annual reports be mailed to the stockholders. There is no specification of any violation of any such direction nor could there be since the trustee did comply with every direction of the court in this respect.

The third specification in support of the charge of fraud on the court by the Securities and Exchange Commission is that the Commission failed to advise the court that on March 6, 1957, when Surface Transit, Inc., the new corporation, applied for listing of its bonds on the New York Stock Exchange, the Third Avenue stock continued to be a listed security and a registered security. Again there is a failure to allege that the court was in any way deceived as to the listing or registration of the stock.

The final and fourth specification in support of the charge of fraud upon the court by the Securities and Exchange Commission is the Commission's alleged failure to advise the court that in striking the stock from the listing on May 4, 1957, the New York Stock Exchange failed to comply with the applicable law and regulations.

The suspension of the common stock from trading was accomplished pursuant to Rule X-12D2-1 of the Securities and Exchange Commission and Section A 16 of the Rules of the Stock Exchange (N. Y. S. E. Company Manual A 290-291).

Said Securities and Exchange Commission rule provides in pertinent part:

> "(a)(1) A security listed and registered on a national securities exchange may be suspended from

trading by such exchange, in accordance with its rules."

Said Stock Exchange rule provides in pertinent part:

> "*Authoritative Advice that Security is Without Value:* The Exchange does not pass judgment upon the value of securities. However, immediately upon receipt of advice, deemed by it to be authoritative, that a listed security is without value, the Exchange will suspend dealings therein."

When counsel for the reorganization trustee supplied the Exchange, at its request, with a certified copy of the order of this court dated August 5, 1955, determining that the debtor was insolvent and its stock without value, the Exchange most properly "deemed" the "advice" of this court to be "authoritative". This court not only had jurisdiction to make such a finding but, under the Bankruptcy Act, its jurisdiction was exclusive. Hence the suspension of trading was in all respects justified, and, in fact, compelled by the circumstances.

The delisting of the old stock was similarly effectuated in complete compliance with law.

Following the provision of the rules of the Exchange with respect to suspension of trading referred to above, reference is made to delisting:

> "Dependent upon subsequent events and all circumstances of the particular case, the Exchange may, at an appropriate time subsequent to the suspension of dealings, make application to the Securities and Exchange Commission, under the Commission's Rule X-12D2-1 or Rule X-12D2-2 (whichever may be appropriate in the circumstances), for removal of the security from listing and registration (and after all due action is taken in respect of such application, the security will be removed from listing and registration); or the Exchange may restore the security to dealings if circumstances seem to warrant such restoration.

No action is required of the company to effect suspension from dealings, or subsequent removal from listing and registration under this procedure except for the furnishing of such information or notice as the Exchange may request."

The applicable Securities and Exchange Commission rule (X-12-D2-2) provides in pertinent part:

"(a) Within a reasonable time after a national securities exchange knows or is reliably informed that any of the following conditions exist with respect to a security listed and registered thereon, the exchange shall file with the Commission a notification on Form 25 of its intention to remove such security from listing and registration:

• • • • •

(4) All rights pertaining to the entire class of the security have been extinguished: Provided, That where such an event occurs as the result of an order of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired, and no appeals shall be pending.

Effective date of removal: If the conditions of this section are complied with, removal of a security from listing and registration pursuant to a notification on Form 25 (§ 249.225 of this chapter) shall become effective at the opening of business on such date as the exchange shall specify in said form."

Almost two years after this court had found the stock to be without value and subsequent to the reaffirmation of this finding in the order confirming the plan of reorganization entered on October 8, 1956, the affirmance of that order by the Court of Appeals on November 30, 1956, the denial of Woolfson's petition for certiorari by the United States Supreme Court on March 11, 1957, and the denial of his petition for a rehearing on April 8, 1957, and the subsequent entry of this court's order finding that the plan had been

substantially consummated, the Stock Exchange filed the notification provided by the S.E.C. rule and, in due course, removed the stock from listing and registration.

It is clear that the actions of the Stock Exchange were in accordance with its rules and the rules of the Securities and Exchange Commission.

The motions are denied.

Dated: November 28, 1958

E. J. DIMOCK
United States District Judge

A 11

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 181—October Term, 1956.

(Argued November 8, 1956 · Decided November 30, 1956.)

Docket No. 24362

In the Matters

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Appellant,

—v.—

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Appellees.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeals from orders of the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge.*

Appellant, claiming to be a stockholder and creditor of Third Avenue Transit Corporation, appeals from three separate orders, approving a plan of reorganization, con-

firming the plan, and denying a motion to set aside an order finding the debtor insolvent. Not reported below. Affirmed.

A. Philip Woolfson, *Attorney Pro Se*, New York City.

Saxe, Bacon & O'Shea, New York City (William J. O'Shea, John A. Kiser and Martin Fogelman, New York City, of Counsel), *for Lester T. Doyle, Trustee in Reorganization.*

Thomas G. Meeker, General Counsel, David Ferber, Assistant General Counsel, Washington, D. C. (Richard V. Bandler, Attorney, New York City, of Counsel), *for Securities and Exchange Commission.*

Kelley, Drye, Newhall & Maginnes; New York City (Frank H. Heiss, New York City, of Counsel), *for The Hanover Bank, Indenture Trustee under the First Refunding Mortgage.*

Wagner, Quillinan & Tennant, New York City (Sidney R. Nussenfeld, New York City, of Counsel), *for Colonial Trust Company as Successor Trustee under the Adjustment Mortgage.*

Peter Campbell Brown, Corporation Counsel, New York City (Sidney Brandes, New York City, of Counsel), *for the City of New York.*

Shearman & Sterling & Wright, New York City (Grayson M-P Murphy and Thomas R. Nangle, New York City, of Counsel), *for Fifth Avenue Coach Lines, Inc.*

MURPHY, BLOCK, SULLIVAN & SAWYER, New York City (John Dwight Sullivan, New York City, of Counsel), *for O'Connell Committee for First Refunding Bondholders.*

HAROLD P. SELIGSON and MORTON E. YOHALEM, New York City (Morton E. Yohalem, New York City, of Counsel), *for Amott Committee for First Refunding Bondholders.*

CHARLES POLETTI, HOFFMAN, BUCHWALD, NADEL & HOFFMAN and BUCHMAN & BUCHMAN, New York City (Charles D. Hoffman, New York City, of Counsel), *for Imperial Bank of Canada, et al., Adjustment Income Bondholders.*

KRESEL & MEYERSON, New York City (Samuel Meyerson, New York City, of Counsel), *for Tinker Committee for Adjustment Bondholders.*

BERGERMAN & HOURWICH, New York City (Joseph Calderon, New York City, of Counsel), *for Smith Committee for Adjustment Bondholders.*

HAYS, ST. JOHN, ABRAMSON & HEILBRON, New York City (Edward M. Garlock and Osmond K. Fraenkel, New York City, of Counsel), *for Petitioning Creditors.*

MEDINA, *Circuit Judge:*

A corporate reorganization of Third Avenue Transit Corporation was commenced by the filing of an involuntary petition in the District Court for the Southern District of New York on October 25, 1948. Various plans of reorganiza-

tion were formulated and amended or modified. After numerous and prolonged hearings and consideration by the Securities and Exchange Commission and the Public Service Commission of the State of New York, a Joint Plan of Reorganization was finally evolved. This Plan was duly approved by the District Court; but, before the confirmation of the Plan, appellant, an alleged holder of common stock and at least one of the Adjustment Income Mortgage Bonds of the debtor, appeared on the scene and made a series of motions to block the consummation of the Plan.

The matter came before us on the motion calendar on November 8, 1956, when appellees moved to dismiss the appeals, hereinafter described, as frivolous. As appellant's points were numerous, we proceeded, with the consent of all parties, to hear the appeals on the merits forthwith, on oral argument and on the briefs then and later submitted.

There are three appeals:

(1) From an order of September 11, 1956, denying appellant's motion to vacate an order of August 5, 1955, adjudging the debtor to be insolvent and to reopen the question of solvency for further consideration;

(2) From an order of July 26, 1956, approving the Joint Plan of Reorganization;

(3) From an order of October 8, 1956, confirming the Joint Plan of Reorganization.

Despite the unsubstantial and technical character of the miscellany of points urged upon us as ground for reversal, we have given each of them careful consideration. There is not a shred of merit in any of them.

I.

The insolvency of the debtor is abundantly established as of the date of the order of adjudication and long prior

thereto. But appellant insists that the failure of the Court to require notice to the stockholders that this order had been entered "deprived them of the right to appeal," and that "since the requirements of due process were not complied with by the Appellees, the order of the District Court of August 5, 1955 with respect to debtor's insolvency should be set aside." We fail to understand how anyone was in any sense "deprived" of the right to appeal, unless appellant is contending that the stockholders had received no notice that such an order might be entered. But the stockholders had been apprised of this likelihood in several ways. As recently as June 28, 1955, which was shortly before entry of the order complained of, notices had been mailed reminding them that under the trustee's plan "No provision is made for the stockholders of debtor Third Avenue since the assets of that debtor are insufficient to pay its creditors in full." The notice announced the time and place of the resumption of the hearings and stated, "Any creditor or stockholder has the right to appear in person or by duly authorized representative at the hearing and make objections or propose amendments to the Trustee's Amended Plan of Reorganization, or propose another plan or plans of reorganization." This disposes of appellant's appeal No. 1.

II.

Appellant contends that the District Court lacked power to enter its order approving the plan because of failure to comply with the requirement of Section 171 of the Bankruptcy Act (11 U. S. C. Section 571) that "Notice of the time of any hearing, as provided in section 169 * * * shall be given to * * * the creditors and stockholders * * *" Section 169 (11 U. S. C. Section 569) provides:

> "Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan

cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."

It is not disputed that there was notice of the commencement of hearings following submission of the original plan by the trustee, as well as additional notices preceding approval of the plan. Appellant's position seems to be that further notice is required by the Act. We find no such requirement. On the contrary, if separate notice were required as a condition precedent to the consideration of every amendment or modification or to resumption of the hearings following a recess, it is plain that any party so minded could delay the proceeding indefinitely and cause needless and prohibitive expense.

The statute contemplates a continuous process which may culminate in the approval of a fair and equitable and feasible plan, initiated by the filing of the trustee's plan with widespread notice of the commencement of hearings. Creditors and stockholders and other interested persons have the right to be heard and to object or to propose amendments or modifications and even to file completely new plans. The notices of plan hearings uniformly state, as did the notice in this case, that the hearings may be adjourned from time to time without further notice other than the announcement of such adjournment in open court.

Appellant also contends that before approving the Plan the Court should have ordered notice by publication as well as notice by mail. He points to no authority to support this contention. Section 207 of the Act (11 U. S. C. Section 607) provides that, "Except where otherwise provided in this chapter, the judge may from time to time enter orders designating * * * the form and manner in which notice may be given," and Section 120 (11 U. S. C. Section 520) provides that, "Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified

hereunder, * * * the form and manner in which such notice shall be given."

The objections urged by appellant do not establish failure to comply with Section 171.

Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178 (11 U. S. C. Section 578) since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission.

III.

In his third appeal, appellant urges that the order confirming the plan is invalid because of failure to comply with Section 179 (11 U. S. C. Section 579), which requires acceptance "by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed in each class." The undisputed facts are that some 84 per cent in amount of the holders of the adjustment mortgage income bonds who filed claims accepted the plan, but that these assenting bondholders represented less than two-thirds of the total issue. The question is simply whether acceptance by the holders of two-thirds of the entire issue is required or only by the holders of two-thirds of the amount claimed and allowed. The statute is explicit on the point, and we find little to recommend appellant's argument that it would be "ridiculous" to construe the statute as meaning what it says since acceptance by the holders of only a tiny fraction of the issue would be sufficient where only a few claims are filed. We think it not unreasonable to provide that if only a few creditors are available and interested enough to vote, they should determine acceptance or rejection of the Plan by their class. In any event, we are not at liberty to vary the requirement of the Act. And if Section 179 were thought to leave any doubt as to what that requirement is, such

doubt would be dispelled by Section 198 (11 U. S. C. Section 598), which provides:

> "An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: Provided, however, That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included."

This section also disposes of appellant's contention that for purposes of determining the class, the acceptance of two-thirds of which was necessary, "it was clearly erroneous for the District Court Judge to require the Adjustment Bondholders individually to file proofs of claim."

Appellant's remaining points are frivolous on their face, and we shall not discuss them.

The orders appealed from are affirmed.

No. 877

In the Supreme Court of the United States

OCTOBER TERM, 1958

A. PHILIP WOOLFSON, PETITIONER

v.

LESTER T. DOYLE, AS TRUSTEE IN REORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

J. LEE RANKIN,
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OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. 2) is not reported. The opinion of the district court (R. 56a–64a) is not reported.

JURISDICTION

The order of the court of appeals was entered on April 10, 1959 (Pet. 2). The petition for a writ of certiorari was filed on April 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 178 of Chapter X of the Bankruptcy Act, which requires that plans of reorganiza-

tion of intrastate public utilities be approved by the state commissions having regulatory jurisdiction over them, deprives the federal courts of bankruptcy jurisdiction over intrastate public utilities not subject to state regulation.

2. Whether petitioner was entitled to an order requiring the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange.

3. Whether common stockholders were given adequate notice of the certain stages in the reorganization proceeding.

STATUTES INVOLVED

Section 178 of Chapter X of the Bankruptcy Act, as amended (52 Stat. 891, 11 U.S.C. 578), provides:

> In case a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State commission having regulatory jurisdiction over such debtor, a plan shall not be approved, as provided in section 174 of this Act, unless such State commission shall have first certified its approval of such plan as to the public interest therein and the fairness thereof. Upon its failure to certify its approval or disapproval within thirty days, or such further time as the court may prescribe, after the submission of the plan to it, as provided in section 177 of this Act, the public interest shall, for the purposes of such approval and of the confirmation of the plan, not be deemed to be affected by the plan.

Section 21(e) of the Securities Exchange Act of 1934 (48 Stat. 899, 15 U.S.C. 78u(e)) provides:

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

STATEMENT

Petitioner is a common stockholder of Third Avenue Transit Corporation, a company which has been in reorganization under Chapter X of the Bankruptcy Act since 1949. Under the plan of reorganization which has been approved, confirmed and consummated, no participation was accorded the stock of the debtor, since there were insufficient assets fully to compensate its junior creditors. Petitioner previously had appealed from orders of the district court approving and confirming the plan and refusing to set aside an order adjudging the debtor insolvent. That appeal was based on the ground, *inter alia*, that there was lack of adequate notice of the finding of insolvency. The orders of the district court were affirmed. *Woolfson* v.

Doyle, 238 F. 2d 665, certiorari denied, 352 U.S. 1031, rehearing denied, 353 U.S. 931. Thereafter petitioner moved in the reorganization court (1) to vacate an order directing consummation of the Joint Plan of Reorganization and to reopen the proceedings or, in the alternative, to modify the order confirming the Joint Plan of Reorganization; (2) to vacate the order awarding final allowances; and (3) to compel the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for alleged noncompliance with the Commission's delisting rules. The district court denied the motions (R. 65a–66a), and the court of appeals dismissed petitioner's appeal, stating that the grounds thereof were "utterly lacking in merit" (Pet. 2).

ARGUMENT

1. Petitioner contends (Pet. 6–11) that, by virtue of an amendment to the Public Service Law of New York in 1950,[1] the New York Public Service Commission was divested of any regulatory jurisdiction over the debtor. From this premise petitioner concludes that the district court was deprived of further jurisdiction with respect to the reorganization of the debtor, a public utility corporation, owing to the provisions of Section 178 of Chapter X of the Bankruptcy Act (*supra*, p. 2). Even if, contrary to the express holding of the district court (R. 58a–60a), petitioner's premise were valid, the conclusion would nevertheless be clearly erroneous. Section 178 merely

[1] Section 5-d, Public Service Law, Laws of 1950, Chapter 163, as amended by Laws of 1953, Chapter 618.

provides that a reorganization plan of an intrastate utility is in effect subject to veto by a state regulatory commission having jurisdiction over the utility. Where the prescribed conditions do not exist, Section 178 is inapplicable. There is nothing in the language or the legislative history of this section to indicate that Congress intended that a Chapter X court was not to assume or retain jurisdiction over an intrastate utility not subject to regulation by a state commission.[2]

2. Assuming, contrary to the holding of the reorganization court,[3] that the New York Stock Exchange had not complied with the Commission's rules in delisting the stock of the debtor, the court nonetheless was without power to compel the Commission to institute criminal proceedings against the Stock Exchange. The Commission's statutory authority is limited to the referral of evidence concerning possible criminal violations to the Attorney General. See Section 21(e) of the Securities Exchange Act of 1934, *supra*, pp. 2–3. And the power of the Commission with respect to the initiation of enforcement proceedings is not subject to court review. *Crooker* v. *Securities and Ex-*

[2] On his prior appeal, petitioner contended that the court's submission of the plan to the New York Public Service Commission was improper. The court of appeals disposed of this contention by stating (238 F. 2d at 669):

"Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178, 11 U.S.C.A. § 578, since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission."

[3] R. 61a–64a. The district court holding was in accord with the view expressed to the court by the Commission.

change Commission, 161 F. 2d 944, 949 (C.A. 1); cf. *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 99–100 (C.A. 3).

3. Adequate notice in accordance with the provisions of Chapter X was provided throughout the reorganization proceedings of the debtor. On petitioner's prior appeal the court of appeals rejected petitioner's contention that special notice to stockholders of the entry of the order adjudging the debtor insolvent, as distinguished from notice of hearing on the proposed plans of reorganization (see Section 171, 11 U.S.C. 571), was required. 238 F. 2d at 868. As the court of appeals there noted, notice that the common stockholders were not provided for in the trustee's proposed plan of reorganization was given shortly before entry of the order adjudging the debtor to be insolvent. Petitioner has sought to raise the same issues again under the guise of general allegations of fraud on the part of the reorganization trustee and others. The allegations are based simply on affidavits of several stockholders that they did not receive notice, despite evidence in the record (R. 45a–47a, 53a–54a), accepted by the district court (R. 57a), that notice was mailed to all stockholders.[4]

[4] Significantly, the district court charged with the responsibility of conducting these proceedings in reorganization over a number of years specifically found that the common stockholders were "vigorously and capably represented at all hearings where their interests were involved" (R. 57a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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DAVID FERBER,
Assistant General Counsel,
RICHARD V. BANDLER,
Special Counsel,
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Attorney,
Securities and Exchange Commission.

MAY 1959.

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IN THE

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OCTOBER TERM, 1958

No. 877

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

v.

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introduction

One would infer from a perusal of the briefs filed by the Reorganization Trustee and the Securities and Exchange Commission in opposition to the petition for certiorari that

the sole object of petitioner's motions in the District Court was to permit petitioner's claim of denial of due process to be litigated again. In effect the Reorganization Trustee and the Securities and Exchange Commission aver (1) that there are no new elements of fact which were not or might not have been presented to the District Court in the previous litigation; (2) that under the principle of *stare decisis* the Court of Appeals prior determination of the law of the case should stand; (3) that no legal error was committed in dismissing petitioner's recent appeal as frivolous; and (4) that fundamental and substantial justice will be promoted by this Court's denial of certiorari.

The Question of Criminal Prosecution of the New York Stock Exchange

When the hearing in the District Court on petitioner's motion to mandamus the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for wilful violation of S.E.C. delisting regulations was adjourned at the request of counsel for the reorganization trustee, petitioner anticipated that a hearing would be had, at which time the Securities and Exchange Commission would present its brief to aid the Court in deciding on the motion. If, as the Commission now maintains, there was a question of statutory construction as to the Commission's discretion to enforce the criminal penalties provided in the Securities and Exchange Act of 1934, such question should properly have been raised initially in the District Court. The primary question would however appear to be that of Commission interpretation of the language of its own delisting regulations and their application. The Commission and the Reorganization Trustee did not come into the Court of Appeals with clean hands when they justified the action of the New York Stock Exchange in delisting the common

stock of debtor some five months after the assets of the debtor had been acquired by Fifth Avenue Coach Lines, Inc., which company on December 16, 1956 had acquired all of the 1,160,000 shares of common stock of the new company, Surface Transit Inc. The delisting action not having taken place until May 4, 1957, this was certainly a new fact that was not before either the District Court or the Court of Appeals in the former proceedings relating to the denial of due process to petitioner.

The Question of the Court's Jurisdiction

The Commission and the Trustee concede that at the time of the District Court's hearings on the question of strict insolvency of debtor, jurisdiction over rates of fare and service of debtor's principal subsidiary, Surface Transportation Corporation of New York (which subsidiary provided some 95% of the gross operating revenues of the system) was lodged with the City of New York, and such regulatory jurisdiction was at the time of the institution of the reorganization proceedings for the debtor and its subsidiaries lodged with the Public Service Commission of the State of New York.

In approaching the question of Congressional intent as to Federal Court jurisdiction over reorganizations of intrastate public utilities the specific circumstances of this reorganization must be kept in mind in the light of the general principles covering utility valuation. Since the only thing that a bus company has to sell is service and since the function of a Public Service Commission having regulatory jurisdiction is to provide a rate of fare which will give the regulated company a reasonable return from the service which it sells, such return being based on the commission's valuation of the bus company's property devoted to the public service, it would seem logical to assume that Congress contemplated, when it made State Public

Service Commission approval of a reorganization plan for an intrastate public utility a condition precedent to Court approval, that (1) the State Public Service Commission would at the time of the institution of reorganization proceedings have jurisdiction to fix rates of fare that would not be confiscatory on the basis of valuation of the company's property, which valuation had previously been approved by the Commission, and (2) that the State Public Service Commission would continue to have jurisdiction throughout the course of the reorganization proceedings over such rates of fare, and that such regulatory jurisdiction would not have terminated prior to the submission of a reorganization plan. In the instant reorganization proceeding the primary problem of debtor was the inability to obtain an adequate rate structure to meet the pressure of increased costs; public transportation policies of the City of New York subordinated economics to political considerations, as is suggested by the statement of the Mayor of the City of New York which appeared in the New York Times on April 25, 1959. The Mayor then said: "I consider the maintenance of a low transit fare important to the city. Our people must be able to get around speedily and cheaply. We have gone to great pains to maintain that fare. And it is today the lowest fare of any major city in the United States. I will make every effort, as I have done till now, to keep it that way." To keep bus fares low private bus companies have had imposed upon them the burden of carrying school children at greatly reduced fares, while their rates of fare to the public were determined on the basis of the rates of fare established by the City of New York for its subsidized subway and bus transit system.

That Congress did not intend to give Federal Courts jurisdiction over intrastate public utilities which were not under the regulatory jurisdiction of State Public Service

Commissions is further suggested by the fact that for corporations other than intrastate public utilities valuation for the purpose of a reorganization plan may be determined on the findings of the Securities and Exchange Commission (which the Court may disregard), but valuation for the purpose of a reorganization plan and whether the reorganization plan is compatible with the public interest must be determined by the Public Service Commission, having regulatory jurisdiction over debtor, independent of the Court's findings, and the Court may not disregard such findings.

The Question of Fraud

Petitioner has set forth at length in the motions submitted to the District Court facts which appear to the petitioner to constitute fraud perpetrated upon the Court. The District Court chose to believe the trustee rather than petitioner. This then resolves itself pretty much into a question of credibility: to petitioner it is inconceivable that an honest trustee and an honest S.E.C. counsel would pursue a course of conduct with respect to the delisting of the debtor's common stock as appears on the record. There is no rule of law which requires stockholders in a Chapter X proceeding to act on the presumption that the trustee and the Securities and Exchange Commission are liars and refuses them redress when they fail to act on that presumption.

CONCLUSION

The reorganization plan is illegal and unconstitutional and the assets of debtor were illegally acquired by Fifth Avenue Coach Lines, Inc. The petition for certiorari should be granted.

Dated, New York, N. Y.
June 2, 1959

Respectfully submitted,

A. Philip Woolfson,
Attorney Pro Se.

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JUN 27 1959

JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1958

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SIRS:

Petitioner petitions for rehearing of the order of June 8, 1959 denying petition for writ of certiorari on grounds which were not raised in the petition of certiorari but which are available to petitioner and are of a substantial nature.

1. The Solicitor General is incorrect in his argument[1] that (1) the court was without power to compel the Commission to institute criminal proceedings against the New York Stock Exchange, and (2) the power of the Commission with respect to the initiation of enforcement proceedings is not subject to court review.

What is involved in the instant case is not the question of the Commission's discretionary power under Section 21(e) of the Securities Exchange Act of 1934[2] to enforce compliance with the Commission's regulations but rather the power of the Commission to initiate criminal proceedings for past violations of its regulations and whether such power is subject to court review. There is nothing in the Act or in its legislative history that suggests any Congressional intent to deprive the Commission of full power of prosecution under the provisions of Section 32 of the Securities Exchange Act of 1934[3] which provides for fine and/or imprisonment upon conviction for wilful violation of any provisions of the Act or any rule or regulation thereunder.

Section 32 of the Securities Exchange Act of 1934 (48 Stat. 904-05, 15 U.S.C., Sec. 78ff(a) provides:

> (a) Any person who willfully violates any provision of this title or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report or document required to be filed under

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[1] Brief for the Securities and Exchange Commission in Opposition, page 5.

[2] 48 Stat. 900 (1934), 15 U.S.C., Sec. 78u(e) 1952.

[3] 48 Stat. 904-05 (1934), as amended, 15 U.S.C., Sec. 78ff(a) 1952.

> this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined, not more than $10,000 or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he has no knowledge of such rule or regulation.

The language of Section 21(e) of the Securities Exchange Act of 1934[4] that "whenever it shall appear to the Commission that any person *is engaged* or *about to engage* in any acts or practices which *constitute* or *will constitute* a violation" (emphasis supplied) indicates that the Commission's enforcement power under this section to secure compliance with the Commission's regulations relates to *present* and *future* violations, and that the evidence that may be transmitted to the Attorney General under this section of the Act relates to present violations. The Solicitor General is in error, however, when he implies that under the Act the Commission's statutory authority to institute criminal proceedings is limited to "the referral of evidence concerning possible criminal violations to the Attorney General". While there is no section in the Act which expressly confers power upon the Commission to take action in the case of *past* violations, it does have the full power of prosecution given it under Section 32[5] of the Act for violations of the Act involving fraud and to seek the imposition of criminal penalties under that section of

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[4] 48 Stat. 900 (1934), 15 U.S.C., Sec. 78u(e) 1952.

[5] 48 Stat. 904-05 (1934), 15 U.S.C., Sec. 78ff(a) 1952.

the Act. The provisions of Section 21(e)[6] of the Act in no way limit or restrict the Commission's power under Section 32 of the Act to enforce the penalties prescribed in that section of the Act for wilful violations and to refer to the Attorney General evidence concerning *past* criminal violations.[7] The power of the Commission to seek court enforcement of its rules as well as the power of the courts to compel the Commission to exercise its power under the Act to initiate enforcement proceedings seeking to enforce penalties prescribed for violations of such rules is provided in Section 27 of the Securities Exchange Act of 1934[8] which states that "the District Courts of the United States * * * shall have jurisdiction of offenses and violations under this subchapter and under the

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[6] 48 Stat. 900 (1934), 15 U.S.C., Sec. 78u(e) 1952.

[7] The Solicitor General cites *Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944, 949 (C. A. 1) to support the view that the court is without jurisdiction to review the Commission's power to initiate enforcement proceedings. That case involved a petition for a decree directing the Commission to institute a proceeding looking to a stop order suspending the effectiveness of a registration statement. The court there held that the Commission had administrative discretion to institute such a proceeding if it appeared to the Commission that a registration statement is false and misleading. Also cited by the Solicitor General is the case of *Jacobsen* v. *National Labor Relations Board*, 128 F. 2d 96, 99-100 (C. A. 3). This case involved a petition for a decree setting aside an order of the National Labor Relations Board dismissing a complaint charging unfair labor practices. The court there held that the Board does not have to cause a complaint to be issued against the employer or proceed to prohibit any unfair labor practice complained of. Both of these cases have to do with the discretionary power of the respective agencies to enforce compliance with the applicable statutes and regulations. Neither case bears upon the question of the power of the Courts to review the Commission's failure to use its power to enforce the criminal penalties of the statute and regulations for wilful violation thereof.

[8] 48 Stat. 902 (1934), 15 U.S.C., Sec. 78aa (1952).

rules and regulations promulgated by the Commission in respect thereto * * *." The power of the District Courts to issue writs of mandamus to compel the Commission to use its power to punish violators is found in 28 U.S.C., Section 1651(a) which states "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."* In *S.E.C. v. Transamerica Corp.*, 163 F. 2d 511 (C. A. 3) the Court held that "the District Court possesses authority to make any order necessary to enforce liabilities or duties created by this chapter or rules promulgated pursuant thereto."

Whether a District Court will mandamus the Commission to enforce the criminal penalty provisions of the statute is a matter of sound judicial discretion. In the present instance there was an abuse of judicial power by the court in denying petitioner a hearing on his motion to mandamus the Commission (R. 39a to R. 44a, R. 55a) since the Court's decision was premised on the argument by the reorganization trustee (R. 49a to R. 52a) and counsel for the Commission (S.E.C. Brief, page 5, footnote 3) that the actions of the New York Stock Exchange in delisting the common stock of debtor Third Avenue Transit Corporation was proper and in full accord with the rules of the Commission. In effect the District Court under the guise of discretion dispensed with indicated and required procedure which in ultimate effect constituted a surrender of jurisdiction to the Commission and premature exoneration and exculpation of the reorganization trustee and the New York Stock Exchange should the Commission's interpretation of the

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* It should be noted that rule 81(b) of the Federal Rules of Civil Procedure abolishes the writ of mandamus but provides that the relief heretofore available by mandamus may be obtained by appropriate action or motion under the practice provided in the rules.

applicable S.E.C. delisting regulation prove to be erroneous on appellate review. In the present instance the failure of the District Court to issue the mandamus order defeated appellate review. (*Maryland* v. *Soper*, 270 U. S. 9, 29, 30, 46 S. Ct. 185, 189, 70 L. ed. 449; *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 77 S. Ct. 309, 1 L. ed. 2d 290.)

2. The decision of the District Court (R. 61a to R. 64a) that the action of the Stock Exchange in delisting the common stock of debtor Third Avenue Transit Corporation was in accordance with the rules of the Securities and Exchange Commission was based on a distorted construction of the provisions of delisting regulation X-12D2-2.

The stock of debtor Third Avenue Transit Corporation was delisted on May 4, 1957 pursuant to application on Form 25 by the New York Stock Exchange filed with the Commission purportedly in compliance with the requirements of S.E.C. Rule X-12D2-2. (Application appears in petitioner's brief, pages 11-13). On November 19, 1956 the certificate of incorporation of debtor Third Avenue Transit Corporation was amended (pursuant to court order confirming reorganization plan) to eliminate the 167,509 shares of common stock of debtor which debtor had previously been authorized to issue (the certificate of amendment became effective on December 6, 1956); these are the securities which were the subject of the delisting application above noted.

The provisions of S.E.C. delisting regulation X-12D2-2 (17 CFR 240.12d2-2) are as follows:

Removal From Listing and Registration of Matured, Redeemed or Retired Securities

RULE X-12D2-2. (a) Within a reasonable time after a national securities exchange knows or is reliably informed that any of the following conditions exist with respect to

a security listed and registered thereon, the exchange shall file with the Commission a notification on Form 25 of its intention to remove such security from listing and registration:

(1) *The entire class of the security* has been called for redemption, maturity or retirement; appropriate notice thereof has been given; funds sufficient for the payment of all such securities have been deposited with an agency authorized to make such payments; and such funds have been made available to security holders.

(2) *The entire class of the security* has been redeemed or paid at maturity or retirement.

(3) The instruments representing the securities comprising *the entire class* have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if such be the fact, the right to receive an immediate cash payment (the right of dissenters to receive the apprised or fair value of their holdings shall not prevent the application of this provision).

(4) All rights pertaining *to the entire class of the security* have been extinguished; provided that where such an event occurs as the result of an order of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired, and no appeals shall be pending.

Effective Date of Removal.—If the conditions of this rule are complied with, removal of a security from listing and registration pursuant to a notification on Form 25 shall become effective at the opening of business on such date as the exchange shall specify in said Form; *provided however*, that such date shall be not less than seven days fol-

lowing the date on which said Form is mailed to the Commission for filing; and *provided further* that in the event removal is being effected under paragraph (a)(3) of this rule and the exchange has admitted or intends to admit a successor security to trading under the temporary exemption provided for by Rule X-12A-5, such date shall not be earlier than the date on which the successor security is removed from its exempt status.

In interpreting the provisions of Rule X-12D2-2 the District Court misread the applicability of sub-paragraph (4) (R. 63a). What is involved in this sub-paragraph is the case of a legal dispute resulting from the repayment, retirement or redemption by a *solvent* corporation of an entire class of its securities. In interpreting sub-paragraph (4) to refer to the delisting of a security where the rights of stockholders have been extinguished through a finding of strict insolvency, the Court ignored the context in which the said sub-paragraph appears, namely, that it applies only to the situation where the entire class of a security is extinguished through payment, redemption or retirement by an existing corporation without court order. The court's interpretation is further not in accord with the provisions of Rule 499 of the Rules of the Board of Governors of the Exchange which covers the delisting of securities in the case of payment, redemption or retirement of entire class, issue or series. That rule provides that "Whenever the entire outstanding amount of a listed class, issue or series is retired through payment at maturity, or through redemption reclassification or otherwise, the Exchange, at a time which is appropriate in consideration of the circumstances of the particular case, may suspend dealings in the security and give notice to the Commission, on the Commission's Form 25 of intention to remove such security from listing and registration, as required by Rule X-12D2-2 of the Commission".

This Court can take judicial notice of the following:

(1) That the New York Stock Exchange has a staff of experts who keep thoroughly abreast of all S.E.C. regulations.

(2) That the Securities and Exchange Commission has a staff of experts who keep thoroughly abreast of all New York Stock Exchange regulations.

(3) That both the New York Stock Exchange and the Commission have a staff of experts who keep continually informed about developments affecting listed securities.

(4) That both the Exchange and the Commission know that corporate action is required to extinguish an entire class of securities through payment, redemption or retirement.

(5) That both the Exchange and the Commission knew that the common stock of debtor was not extinguished through payment, redemption, or retirement.

(6) That the Commission's delisting regulations were intended for the protection of investors in listed and registered securities.

(7) That both the Exchange and the Commission knew that if the delisting application had been filed pursuant to the provisions of Rule X-12D2-1 (R. 20a to R. 23a), that (a) the Board of Governors of the Exchange would have to adopt a resolution directing that such application be filed with the Commission, and (b) the Commission would give interested parties the opportunity to request hearings on such application.

3. The representation by the reorganization trustee to the District Court that the Exchange had complied with

the applicable delisting regulations (R. 51a to R. 52a) was a fraudulent representation. A fraudulent representation to the court is a criminal offense and subjects the maker to the penalties provided in 18 U.S.C., Sec. 1001 (48 Stat. 996). The applicable provision of that statute states that "Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

"Willful" does not require evil intent, but does mean that the forbidden act is done deliberately and with knowledge. (*McBride* v. *U. S.*, 225 F. 2d 249.) The reorganization trustee, senior member of a New York Stock Exchange firm knew that his representation to the court as to the Exchange's compliance with the applicable delisting regulations of the Commission was not true.[10]

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[10] The fraud perpetrated upon the court by the trustee, and condoned by the Commission, with respect to the representation concerning delisting, is related to the fraud alleged by petitioner of denial by the trustee of notice of the hearing on, and the entry of the order of, strict insolvency of debtor (R. 11a, R. 26a to R. 29a).

CONCLUSION

The reorganization proceeding is tainted with fraud. The petition for rehearing should be granted.

Respectfully submitted,

A. PHILIP WOOLFSON,
Attorney Pro Se.

Dated: June 24, 1959.

Certificate

I do hereby certify that the within petition is restricted to the grounds specified in the applicable provisions of Rule 58 of the Supreme Court Rules and that it is presented in good faith and not for purposes of delay.

A. PHILIP WOOLFSON,
Attorney Pro Se.

Dated: June 24, 1959.